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Judicial Review in Comparative Perspective

[2006]

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Syllabus

I. Introduction (Meeting 1)

The Age of Constitutionalism

Lisa Hilbink, Beyond Manicheanism: Assessing the New Constitutionalism, 65 Md. L. Rev. 15 (2006) 17-19 (5)

Possible reasons

1. Jon Elster, Forces and Mechanisms in the Constitution Making Process, 45 DUKE L. J. 364 (1995) (6-26)
2. Ran Hirschl, Towards Juristocracy (2004) 31-49 (27-36)

II. Theory – Three Models of Constitutionalism (Meetings 2-5)

A. Strict Constitutionalism

Rationale

Jeremy Waldron, Precommitment and Disagreement, in CONSTITUTIONALISM (Larry Alexander ed. 1998) 271, 274-276 (37-38)

Counterarguments

1. Waldron, Precommitment and Disagreement, 281-285 (39-41)
2. Michael Perry, THE CONSTITUTION IN THE COURTS (1994) 16-17 (citing Bickel) (42)
3. Michael W. McConnell, Textualism and the Dead Hand of the Past, 66 GEO. WASH. L. REV. 1127 (1998) 1127-1133 (43-49)
4. Perry, THE CONSTITUTION IN THE COURTS 91-92 (citing Thayer) (50-51)
5. Ronald Dworkin, FREEDOM'S LAW, 339-347 (1996) (52-56)
6. Jeremy Waldron, LAW AND DISAGREEMENT (1999) 289-291 (57-58)
7. W. Brennan Jr., Why Have a Bill of Rights? 9 OXFORD J. LEGAL STUDIES 425, 432-434 (59-61)
8. Erwin Chemerinsky, Losing Faith: America without Judicial Review, 98 MICH. L. REV. 1416 (2000) 1416-1421 (reviewing Mark Tushnet, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999)) (62-67)

Proposed solutions

1. Perry, THE CONSTITUTION IN THE COURTS, pp. 86-88 (68-69)
2. Paul W. Kahn, LEGITIMACY AND HISTORY (1992), 135-38, 147-51 (70-75)
3. Terri Jennings Peretti, IN DEFENSE OF A POLITICAL COURT (1999) 84-85, 131-132 (76-78)
4. John C. Yoo, Choosing Justices: A Political Appointments Process and the Wages of Judicial Supremacy, 98 MICH. L. REV. 1436, 1449-1453 (2000) (79-83)
5. Hilbink, Beyond Manicheanism, 28-30 (84-85)
6. A. Scalia, Originalism: The Lesser Evil, 57 U. CIN. L. REV. 849, 852-56 (1989) (86-88)
7. Peretti, IN DEFENSE OF A POLITICAL COURT (1999) 14-24 (89-94)
8. Kahn, LEGITIMACY AND HISTORY, 142-147 (95-97)
9. Rivka Weill, We the British People, 2004 PUBLIC LAW 380, 380-383 (98-99)

Alternatives?

Jon Elster, Limiting Majority Rule: Alternatives to Judicial Review in the Revolutionary Epoch, in CONSTITUTIONAL JUSTICE UNDER OLD CONSTITUTIONS (E. Smith ed., 1995) 3-21 (100-109)

B. Dialogical Constitutionalism

1. Barry Friedman, Dialogue and Judicial Review, 91 MICH. L. REV. 577, 653-680 (1993) (110-137)
2. Christopher P. Manfredi & James B. Kelly, Six Degrees of Dialogue: A Response to Hogg and Bushell, 37 OSGOODE HALL L.J. 513 (1999) (138-152)

3. Stephen Gardbaum, The New Commonwealth Model of Constitutionalism, 49 AM. JUR. COMP. L. 707, 739-748 (2001) **(153-162)**

C. Gag-Rule Constitutionalism

S. Holmes, Gag Rules or the Politics of Omission, in CONSTITUTIONALISM AND DEMOCRACY (Jon Elster and Rune Slagstad eds. 1988) 19-58 **(163-183)**

III. Dialogical Constitutionalism in Practice (Meetings 6-8)

A. New Zealand

1. James Allan, The Effect of a Statutory Bill of Rights where Parliament is sovereign: The Lesson from New Zealand, in SCEPTICAL ESSAYS ON HUMAN RIGHTS (T. Campbell, K.D. Ewing & A. Tomkins eds. 2001) 375-390 **(184-192)**

B. United Kingdom

Readings:

1. David Feldman, The Human Rights Act 1998 and Constitutional Principles, 19 LEGAL STUDIES 165-206 (1999) **(193-234)**
2. David Bonner, Helen Fenwick, Sonia Harris-short, Judicial Approaches to the Human Rights Act, 52 INT. & COMP. L. Q. 549-585 **(235-271)**
3. Janet L. Hiebert, Parliament and the Human Rights Act: Can the JCHR help facilitate a culture of rights? , 4 INT'L J. CONST. L. 1 (2006) **(272-309)**

C. Canada – Does it Work?

1. Mark Tushnet, Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty, 94 MICH. L. REV., 275-301 (1995) **(310-324)**
2. Tsvi Kahana, The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the Charter, 44 CAN. PUB. ADMIN. 255 (2001) **(will be distributed separately)**
3. Kent Roach, Dialogue or defiance: Legislative reversals of Supreme Court decisions in Canada and the United States, 4 INT'L J. CONST. L. 461 (2006) **(325-348)**

IV. Concentrated v. Diffused Judicial Review (Meetings 9-11)

A. Introduction

1. M. Cappelletti & William Cohen, COMPARATIVE CONSTITUTIONAL LAW (1979) 73-95 **(349-360)**
2. R. Brewer-Carias, JUDICIAL REVIEW IN COMPARATIVE LAW (1989), 125-35, 185-94 **(361-372)**
3. Victor Ferreres Comella, The European Model of Constitutional Review of Legislation: Toward Decentralization? 2 INT'L J. CONST. L. 461 (2004) **(373-403)**

B. United States - Diffused

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3. Robert A. Kagan, Constitutional Litigation in the United States, in CONSTITUTIONAL COURTS IN COMPARISON (R. Rogowski & T. Gawron eds. 2002) 25-51 **(424-437)**
4. Antonin Scalia, The Bill of Rights: Confirmation of Extant Freedoms or Invitation to Judicial Creation, in LITIGATING RIGHTS (G. Huscroft & P. Rishworth eds. 2002) 19-27 **(438-442)**

C. Germany - Concentrated

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2. Donald P. Kommers, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY (2nd ed. 1997) 3-29 **(457-470)**

V. Judge-Made Constitutions (Meetings 12-13)

A. France

1. A. R. Brewer-Carias, JUDICIAL REVIEW IN COMPARATIVE LAW 251-260 **(471-476)**
2. Alec Stone, THE BIRTH OF JUDICIAL POLITICS IN FRANCE (1992) 60-92 **(477-493)**
3. Marie-Claire Ponthoreau & Jacques Ziller, The Experience of the French Conseil Constitutionnel: Political and Social Context and Current Legal-Theoretical Debates, in CONSTITUTIONAL JUSTICE, EAST AND WEST (2002) 119 **(494-506)**

B. Israel

1. Ruth Gavison, The Controversy Over Israel's Bill of Rights, 15 ISR. Y.B. ON HUM. RTS. 113, 153-54 (1985) **(507-528)**
2. Daphne Barak-Erez, From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective, 26 COLUM. H. R. L. REV. 309, 318-331; 346-354 (1995) **(529-551)**
3. Hirschl, TOWARDS JURISTOCRACY, 21-24, 50-74 **(552-567)**